No. 75-5387

ORIGINAL COPY

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

RODOLFO SIFUENTES, PETITIONER

v.

UNITED STATES OF AMERICA

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SUPREME COURT, U.S.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

ROBERT H. BORK,
Solicitor General,

Department of Justice,
Washington, D. C. 20530.

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MEMORANDUM FOR THE UNITED STATES

Petitioner contends that the warrantless stop of his vehicle by Border Patrol officers at a fixed immigration checkpoint was unlawful under the Fourth Amendment because the officers lacked a reasonable suspicion that the vehicle contained aliens illegally in the country.

After a jury trial in the United States District Court for the Southern District of Texas, petitioner was convicted on four counts of transporting aliens who were illegally in this country, in violation of 8 U.S.C. 1324(a)(2). He was sentenced to concurrent terms of two years' imprisonment on counts 1 and 2, with all but six months of the sentence suspended in favor of three years' probation. He was sentenced to concurrent terms of two years' imprisonment on counts 3 and 4, to run consecutively with the sentences imposed on counts 1 and 2; the sentences on counts 3 and 4, however, were suspended in favor of three years' probation. The court of appeals affirmed (Pet. App. A).

The evidence at petitioner's trial [1] established that the vehicle he was driving was stopped at a permanent immigration checkpoint near Sarita, Texas, at about 3:00 A.M., on April 28, 1974, as he was traveling north on U.S. Highway 77 about 65 miles north of the Mexican border. As a Border Patrol officer on duty approached the vehicle to inquire about petitioner's citizenship and immigration status, he observed four other persons in the vehicle, one in the front seat and three in the rear, who were slumped down in the seats as if asleep. Upon questioning the four passengers, the officer determined that they were citizens of Mexico and had no documentation authorizing them to be in this country. Petitioner and the four aliens were then taken into custody (Pet. App. B; Tr. 14-20). [2]

The checkpoint at which petitioner was stopped is located on U.S. Highway 77, which originates in Brownsville at the Mexican border and is one of two major arteries leading north out of the lower Rio Grande valley. The checkpoint is equipped with appropriate stop signs and warning lights; it is lighted by flood lights during hours of darkness (Tr. 16-17, 23-24). The facility is operated 24 hours a day, except when inclement weather or

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1/ No separate hearing was held on petitioner's pre-trial motion to suppress the evidence derived from the stop of his vehicle. The court reserved ruling on the motion until evidence relating to the stop of the vehicle was presented at trial (Tr. 2, 4, 14-15).

2/ The four aliens who were apprehended testified at trial that, in accordance with prior arrangements, petitioner picked them up and transported them north after they had illegally crossed the border by swimming the Rio Grande River. The question whether such voluntary testimony of a witness at trial is subject to suppression as the fruit of an allegedly illegal stop was not raised in the courts below, and we do not raise it here.

...checkpoint stops require its closing (Tr. 16). At the time petitioner was stopped, the officers on duty were stopping all northbound vehicles except those whose occupants the officers recognized as local inhabitants of the area (Tr. 16, 22-23).

At the close of the government's case, the court orally denied petitioner's motion to suppress (Tr. 147-148). The court subsequently filed a written memorandum denying the motion (Pet. App. B). The court of appeals affirmed summarily in reliance upon its recent decision in United States v. Santibanez, C.A. 5, No. 74-3382, decided August 11, 1975 (Pet. App. A), which upheld the validity of a routine, warrantless stop of vehicles at the fixed immigration checkpoint near La Gloria, Texas. The court in Santibanez held that there is "no constitutional dereliction in stopping vehicles at this permanent checkpoint for the purpose of determining the occupant's citizenship" (Pet. App. A, p. 2).

This case differs from United States v. Martinez-Fuerte, No. 74-1560, certiorari granted, October 6, 1975, in one material respect. The stop in Martinez-Fuerte was made pursuant to a judicial warrant authorizing such stops, whereas the officers in the present case were acting in the absence of a warrant. As we stated in our petition for a writ of certiorari in Martinez-Fuerte (a copy of which we are sending to petitioner's counsel), it is our contention that "investigative stops of vehicles at checkpoints involve so brief and limited an interference with the legitimate privacy interests of the traveling public that they may lawfully be conducted without advance judicial approval" (p. 11).

Although we view that as the threshold issue in Martinez-Fuerte, we recognize that the Court might take a different view and, without considering the lawfulness of a stop in the absence of a warrant, uphold the stops in Martinez-Fuerte because they had been authorized in advance by a magistrate. Since there was no warrant in this case, the petition squarely presents the question that the Court might find unnecessary to reach in Martinez-Fuerte.

Because of the importance of that question to the Border Patrol's law enforcement efforts, particularly within the jurisdiction of the Fifth and Tenth Circuits where the courts of appeals have upheld the validity of warrantless checkpoint stops, we believe it would be appropriate to grant the petition for a writ of certiorari in this case and consolidate it for argument with Martinez-Fuerte.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

OCTOBER 1975.